United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1344

To be argued by
ALBERT V. TESTA

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOAQUIM CONCEICAO,

Plaintiff-Appellee,

—against—

NEW JERSEY EXPORT MARINE CARPENTERS, INC.,

Defendant and
Third-Party Plaintiff-Appellee,

and

CIA DE NAV. MAR. NETUMAR,

Defendant and
Third-Party Plaintiff-Appellant,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THIRD-PARTY DEFENDANT-APPELLEE

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FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THIRD-PARTY DEFENDANT-APPELLEE

Statement

This is an appeal by the defendant from a judgment in favor of the plaintiff in the sum of $42,000.00 and a dis-

missal of the third-party complaint against International Terminal Operating Co., Inc. This case was tried before the Hon. Robert J. Ward and a jury which answered special questions with respect to the issues set forth by the complaint and the third-party complaint. In answering these special questions the jury found that the defendant was negligent and its vessel the SS MOSQUEIRO was not unseaworthy and that plaintiff was free of any contributory negligence. As to the third-party complaint, although the jury found that I.T.O. had breached its warranty of workmanlike performance of the stevedoring operation, the jury found that the defendant ship owner was precluded by its conduct from recovering indemnity from I.T.O.

The Facts

On November 5, 1970 plaintiff was a longshoreman employed by International Terminal Operating Co., Inc., at Pier 36, East River, New York, and was working aboard the SS MOSQUEIRO, a vessel owned by the defendant, Cia de Nav. Nar. Netumar. Plaintiff testified that while he was engaged with his fellow longshoremen in loading pipes into a pipe bed which had been constructed by the defendant, New Jersey Export Marine Carpenters, Inc., on the weather deck of the SS MOSQUEIRO he sustained an injury to his left foot when it became caught between some of the pipes.

The plaintiff's testimony in this case indicated that one or more of the uprights supporting the pipe bed, made by the defendant, New Jersey Export Marine Carpenters, Inc., broke or collapsed causing the pipe to roll onto plaintiff's left foot resulting in the injuries for which this action was brought (30a, 31a, 68). Plaintiff himself testified that the uprights broke notwithstanding the fact that the pipes were landed nice and easy by the longshoremen and the

winch man had put them in place perfectly (45a, 49a, 70a, 71a). Plaintiff testified that although he was present throughout the entire loading operation he did not see any draft of pipes strike any of the uprights in the pipe bed (48a, 51a, 60a, 71a, 74a).

James Ratliff, I.T.O.'s hatch boss, testified that the longshoremen loaded the pipes in the locations where they were told to load them by the ship's officers and although he was present throughout the loading operation he did not see any of the drafts of pipes strike the uprights (80a, 106a). Nevertheless it was his testimony that one of the uprights in the pipe bed broke (93a, 104a, 105a). It was also his testimony that he inspected the pipe bed and saw nothing wrong with it and that after the plaintiff's accident happened pipes were loaded on top of the No. 1 hatch (85a, 86a, 99a).

James Head, another witness called by the plaintiff, testified that after the accident the longshoremen began loading pipes across the hatch covers up to a level with the pipes in the pipe beds on either side of the No. 1 hatch (133a, 134a, 137a, 138a). He also testified that the pipes were lowered into the pipe bed very gently and did not strike the uprights at any time (132a). William Brooks, another witness called by the plaintiff, testified that the uprights in the pipe bed collapsed while the plaintiff was reaching for the hook to unhook the last draft and that the pipes only moved when the pipe beds collapsed (140a, 141a). Brooks also testified that when the longshoremen returned to work in the afternoon they began to load pipes across the top of the No. 1 hatch (161a).

The plaintiff, Ratliff, Brooks and Head, agreed that throughout the course of the loading operation the pipes were lowered and landed gently into the pipe bed and that at no time did any of the pipe come into contact with any

of the uprights of the pipe bed. Furthermore, they all testified that at no time did they observe any damage to any part of the pipe bed (36a, 71a, 80a, 106a). Ratliff, Head and Brooks were also in complete agreement that one or more uprights broke at the time of plaintiff's accident (77a, 78a, 104a, 105a, 121a, 140a, 141a).

The testimony on behalf of the plaintiff thus presented a factual situation wherein the plaintiff and his witnesses all testified that, despite the fact that no draft of pipes struck the uprights in the pipe bed at any time prior to plaintiff's accident, the uprights in the pipe bed broke or collapsed at the time of plaintiff's accident causing one or more pipes to roll upon his left foot. Although the plaintiff and his witnesses testified that, at the time of the accident, the pipes were loaded below the top of the uprights in the pipe bed, William Montella, General Manager of the defendant, New Jersey Export Marine Carpenters, Inc., testified that when he saw the pipe bed after the plaintiff's accident the pipes were loaded higher than the uprights (258a).

Montella also testified that Richard Piper, the Port Captain for the defendant shipowner, told him exactly what to do in connection with the construction of the pipe beds right down to what nails to use and what lumber to use (236a). Montella further testified that Piper ordered two pipe beds and not 3 (169a, 202a, 253a). Piper admitted that as Port Captain he was responsible for the loading and unloading of the vessel in conjunction with the ship's officers (173a). Piper also testified that there were some 41 pieces of pipe to be loaded in the pipe beds on either side of the No. 1 hatch and it appeared from the cargo plan that there were 41 pieces of pipe to be loaded in the vicinity of the No. 1 hatch (180a).

Although Richard Piper did not appear personally at the trial, his pre-trial deposition was read into evidence and it

was his testimony that he had the responsibility for the loading and unloading of the vessel (175a) and also to coordinate stowage, the ordering of labor and equipment and the overall supervision of the loading operation (172a).

Piper testified that he verbally ordered 3 pipe beds from the defendant, New Jersey Export Marine Carpenters, Inc., (184a) and although he admitted that he did not specifically tell Montella the amount of pipe to be loaded into these pipe beds, he claimed that he gave him the full booking of the vessel and left it up to him to determine the size and location of each pipe bed (184a, 185a, 186a).

Captain James White, the expert who testified for New Jersey Export Marine Carpenters, Inc., stated that the carpenters made the pipe bed for the shipowner and that in the normal and customary practice the shipowner would accept or reject the pipe beds, based upon its own inspection thereof (267a). Captain White also testified that it was customary for ship's officers to shake the uprights to see if they were wobbly in the course of its inspection (268a, 269a).

Captain William Wheeler, I.T.O.'s expert, testified that the chief mate and the carpenter foreman had the duty to inspect the pipe bed (337a). Captain Wheeler further testified that since the pipe bed was made for the shipowner the chief mate had the duty of inspecting it and, if he was satisfied, he would then turn it over to the stevedore for the pipe loading operation (370a, 371a, 376a, 384a, 385a). Captain Wheeler also testified that the hatch boss was only required to make a visual inspection of the pipe bed and that the shipowner had an officer in overall supervision of loading (336a, 337a, 338a, 370a, 384a, 385a).

The various motions, made at various junctures of the case, were denied by the Court (190a-200a, 323a-332a, 393a,

394a). The Court, in denying the defendant's post-trial motion, held that there was sufficient probative evidence to support the jury's verdict and that there was evidence of conduct on the part of the shipowner sufficient to preclude recovery of indemnity (459a, 460a).

POINT I

The testimony in this case presented a question of fact for jury determination and the jury's verdict, being supported by the evidence, dictates affirmance by this Court under controlling decisions.

On the basis of the testimony in this case the jury found that the defendant was negligent and its vessel the SS MOSQUEIRO was not unseaworthy. The finding by the jury that the vessel was not unseaworthy coincided with the jury's findings that the pipe bed made by New Jersey Export Marine Carpenters, Inc., was properly constructed and fit for the purpose for which it was intended. In the face of the testimony by all the witnesses in this case to the effect that one or more of the uprights in the pipe bed broke or collapsed causing a pipe to roll upon the plaintiff's left foot, the finding by the jury that the defendant shipowner was negligent was undoubtedly based upon the conduct of the defendant shipowner in directing the loading of an excessive quantity of pipe into an insufficient number of pipe beds.

Although there was some dispute as to the number of pipe beds ordered by the shipowner with Mr. Piper testifying that he had ordered 3 pipe beds and Mr. Montella testifying that only 2 pipe beds had been ordered, it was undisputed that the cargo plan indicated that there were 41 pieces of pipe to be loaded in the 2 pipe beds on either

side of the No. 1 hatch and it was further undisputed that after the plaintiff's accident the excess quantity of pipe had been loaded on top of the No. 1 hatch. The jury thus could have concluded, and undoubtedly did, that the shipowner was negligent in overloading the pipe beds.

It was the duty of the shipowner to furnish the plaintiff with a safe place in which to work and a vessel reasonably fit for her intended purpose. *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539. The jury in finding the defendant negligent could well have found that the loading of an excessive quantity of pipe into an insufficient number of pipe beds caused lateral transmission of the force of the weight of the pipes which in turn caused one or more uprights to break.

The testimony in this case did not present a question of any alleged negligent method, used by the stevedore for the stowage of the pipe cargo. The method was concededly proper and plaintiff's witnesses testified that the pipes were correctly and gently placed in the pipe bed by the longshoremen. The testimony of William Montella that after the accident some of the pipes were stowed above the height of the uprights together with the testimony to the effect that the overflow of pipes was stowed on top of the No. 1 hatch could reasonably have led the jury to infer that the extra weight caused by pipes stowed above the uprights was the proverbial straw that broke the pipe bed's back. Certainly if the proper number of pipes had been loaded into the pipe bed it is reasonable to assume that the uprights would not have collapsed.

The fulfillment of the duties and obligations of the shipowner to a longshoreman, injured aboard a ship, the question of whether a stevedore has breached its warranty of workmanlike service and the question whether a shipowner's conduct would preclude indemnity are issues of

fact to be determined by the jury. *Weyerhaeuser Steamship Company* v. *Nacirema Operating Company*, 355 U.S. 563, 78 S.Ct. 438. In the *Weyerhaeuser* case, *supra*, the Supreme Court of the United States not only indicated that there might be conduct on the part of the shipowner sufficient to preclude recovery of indemnity but stated that the evidence bearing on whether or not a stevedore performed the stevedoring services in a workmanlike manner and whether there was conduct on the part of the shipowner sufficient to preclude indemnity was for jury consideration under appropriate instructions.

The Seventh Amendment to the Constitution of the United States provides:

> "In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, *and no fact tried by a jury shall be otherwise* re-*examined in any court of the United States than according to the rules of the common law.* (Emphasis added)

The primary purpose of said Amendment was the preservation of the common law distinction between the province of the court and that of the jury whereby issues of law are resolved by the court and issues of fact are resolved by the jury under appropriate instructions from the court. *Baltimore & C. Line* v. *Redman*, 295 U.S. 654; *Dimick* v. *Scheidt*, 293 U.S. 474.

An Appellate Court should not substitute its judgment for that of the jury's and where the evidence is susceptible of different conclusions by reasonable men the issues must be resolved by the jury and the jury's verdict should not be set aside. *Dennis* v. *Denver & Rio Grande Railroad Company*, 375 U.S. 208; *Scheimann* v. *Grace Lines, Inc.*, 267 F.2d 596.

The function of the court with respect to a jury verdict has been enunciated in *Lavender* v. *Kurn*, 327 U.S. 645, wherein the Supreme Court of the United States held that it is only when there is a complete absence of probative facts to support the conclusion reached by the jury that reversible error may appear. However, where there is an evidentiary basis for the jury's verdict, the Appellate Court's function is exhausted and it becomes immaterial whether that court might feel that another conclusion is more reasonable.

In *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines*, 369 U.S. 355, 82 S. Ct. 780, the Supreme Court, in dealing with a shipowner's claim for indemnity against the stevedore arising out of injuries suffered by a longshoreman, held that it was a question of fact for the jury whether the injuries suffered by the longshoreman resulted from any unworkmanlike performance by his employer and reversed the Court of Appeals, thus reinstating a jury verdict in favor of the stevedore.

The Supreme Court in *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines*, said (pp. 358, 359 and 364):

> "We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.'
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> • • • • •
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> *Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search of one possible view*

of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment. Arnold v. Panhandle & S.F.R. Co., 353 U.S. 360, 77 S.Ct. 840, 1 L. Ed. 2d 889. Cf. Dick v. New York Life Ins. Co., 359 U.S. 437, 446, 79 S. Ct. 921, 927, 3 L. Ed. 935.

Reversed." (Italics supplied)

The jury's answers to the special interrogatories, submitted to them by the court (463a-466a), are consistent with the testimony in this case. Manifestly, the jury could have found that the ship's officers were in a position to take action to prevent the pipe bed from being overloaded since they were concededly present and supervising the loading operation and if they had taken some action to prevent overloading of the pipe beds plaintiff's accident may not have happened. It is elementary that negligence can consist of acts of omission as well as commission and such an omission by the ship's officers would of course constitute negligence. Since the vessel's officers and the stevedore worked together from a cargo plan indicating how much cargo was to be loaded and where it was to be loaded, obviously failure of the shipowner to properly inspect the pipe beds and to properly supervise the operation of loading the pipes, as well as the conduct of the shipowner in having too much pipe loaded into the pipe beds in order to comply with the cargo plan, would constitute negligence on the part of the shipowner. This negligence on the part of the shipowner also constitutes conduct precluding recovery of indemnity from the stevedore.

In *Tennant* v. *Peoria & P.U. Ry., Co.*, 321 U.S. 29, the Supreme Court of the United States said (p. 35):

"It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. * * * *That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.*" (Emphasis added)

The question as to whose duty and obligation it was to furnish plaintiff with a safe place to work and to maintain the pipe beds in the vicinity of the No. 1 hatch in a safe and proper condition as well as the questions of whether the stevedore rendered a workmanlike performance in this case and whether the shipowner's conduct would preclude recovery by it of indemnity from the stevedore were unquestionably issues of fact to be decided by the jury and which have, in fact, been decided by the jury in this case in favor of the plaintiff and the stevedore and against the shipowner.

The reasonableness of the stevedore's actions cannot be determined as a matter of law nor can they be evaluated in isolation but must be evaluated within the context of the entire case and once that conduct has been evaluated by a jury an Appellate Court should not substitute its own judgment for that of the jury.

Thus, in dealing with the issues of whether the defendant was negligent, whether the stevedoring services were performed in a workmanlike manner, whether the plaintiff was guilty of any contributory negligence and whether the shipowner was precluded by its conduct from recover-

ing indemnity from the stevedore, the jury in this case determined that defendant was negligent, that plaintiff was not guilty of any contributory negligence and that, although the stevedore had not performed the stevedoring services in a workmanlike manner, the shipowner was not entitled to indemnity.

Under these circumstances this court should not substitute its own judgment for that of the jury for this would be contrary to the Seventh Amendment and inconsistent with the decision of the Supreme Court of the United States in *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines*, 369 U.S. 355, 82 S. Ct. 780. See also *International Terminal Operating Co., Inc.* v. *N.V. Nederl. Amerik. Stoomv. Maats.*, 393 U.S. 74, 89 S. Ct. 53; *Napolitano* v. *Erie Lackawanna Railway Co.*, Docket # 73-2815, decided May 6, 1974 (C.A. 2 Cir.).

POINT II

The jury's finding that the defendant's vessel was not unseaworthy is inconsistent with that portion of the jury's verdict finding a breach of warranty of workmanlike performance by the stevedore.

The doctrine of unseaworthiness and the corollary doctrine of indemnification for unworkmanlike service are tied together because the implied warranty of workmanlike service, imposed upon a stevedore, arises from the vicarious liability imposed upon the shipowner under the doctrine of unseaworthiness which is a species of liability without fault. Indemnification is awarded in a given situation because the unworkmanlike service of the stevedore has cast the shipowner into liability for something that was not the shipowner's fault. *De Gioia* v. *United States Lines Company*, 304 F.2d 421 (Second Cir. 1962).

Beginning with the decision of the Supreme Court in *Seas Shipping Company* v. *Sieracki*, 328 U.S. 55, in which the court extended the doctrine of unseaworthiness to longshoremen, a corresponding duty of indemnity devolved upon the stevedoring company if the shipowner was held liable under the doctrine of unseaworthiness for a condition created or activated by the stevedore's conduct. The primary source of the shipowner's right to indemnity is his nondelegable duty to provide a seaworthy ship by virtue of which he may be held vicariously liable for injuries caused by a condition created or activated by the stevedore's conduct. *Waterman SS Corp.* v. *Dugan and McNamara, Inc.*, 364 U.S. 421.

The implied warranty of workmanlike service running from the stevedore to the shipowner is based upon equitable principles. Conversely, when the shipowner is not found liable under the doctrine of unseaworthiness and is found to be liable for its own negligence there can be no warranty of workmanlike performance and no requirement of indemnity. Manifestly, on equitable considerations, where the shipowner is held liable for its own negligence and not because of any unseaworthy condition of its vessel created or activated by conduct of the stevedore it should not be entitled to be indemnified for its own negligence.

The rationale underlying *Ryan Stevedoring Co., Inc.* v. *Pan Atlantic Steamship Co.*, 350 U.S. 124, the source of the implied warranty of workmanlike performance, the *De Gioia* decision, *supra*, and later decisions is that when a shipowner is held liable under its warranty of seaworthiness and its liability is not dependent upon a finding of its own fault a corresponding duty of indemnification should be imposed upon a stevedore whose failure to render a workmanlike performance caused the injury. On the other hand if the shipowner's negligence caused the injury no

such duty should be imposed. The circumstance which gives rise to the implied warranty of workmanlike performance is the duty of seaworthiness owed to business invitees by the party seeking indemnification. *Italia* v. *Oregon Stevedoring Co., Inc.*, 376 U.S. 323, 84 S. Ct. 748.

In view of the fact that the jury found no unseaworthy condition to be present aboard the defendant's vessel and found that the defendant shipowner was not liable to the plaintiff on the theory of unseaworthiness, and in view of the fact that the jury found that the defendant New Jersey Export Marine Carpenters, Inc. was not negligent and had not breached any warranty of workmanlike performance in connection with the construction of the pipe bed, any conduct of the stevedore in working with a pipe bed that was not defective could not be an unworkmanlike performance and there should be no requirement of indemnification on the part of the stevedore.

Absent considerations of conduct precluding indemnity, there should be no requirement of indemnification by the stevedore in the face of the jury's findings that the defendant's vessel was not unseaworthy.

As this Court said in *Schwartz* v. *Compagnie General Transatlantique*, 405 F.2d 270 (Second Cir. 1968), in an action against the shipowner based solely upon negligence (p. 276):

> "Since any equitable circumstances underlying the decision of courts to require indemnity by applying the implied warranty of workmanlike service are ultimately derived from a shipowner's liabilities under the seaworthiness guarantee, *where there is no such possible liability, as in this case, there can be no requirement of indemnity under the warranty doctrine.*" (Italics supplied)

Since the warranty of seaworthiness and the warranty of workmanlike performance go hand in hand the absence of any liability on the part of the shipowner on the warranty of seaworthiness eliminates any breach of the warranty of workmanlike performance and precludes indemnification.

POINT III

The proof in this case established conduct on the part of the shipowner precluding indemnity. The jury's verdict on the third-party complaint was proper in all respects, is supported by the evidence, and, as has been indicated under Point I, was solely within the jury's province to decide.

The issues of whether the stevedore has breached its warranty of workmanlike service and whether there was conduct on the part of the shipowner precluding indemnity have uniformly been held to be factual issues for resolution by a jury. *Weyerhaeuser* v. *Nacirema,* 355 U.S. 563, 78 S. Ct. 438. In the *Weyerhaeuser* case, *supra,* the Supreme Court held that if the stevedore rendered a substandard performance which led to foreseeable liability of the shipowner the latter was entitled to indemnity *absent conduct on its part sufficient to preclude recovery.* And the court further held that the evidence bearing on these issues was for jury consideration under appropriate instructions.

Although neither the Supreme Court nor this Court has attempted to define with any particularity exactly what constitutes conduct on the part of a shipowner sufficient to preclude indemnity, this Court has indicated that a shipowner's conduct sufficient to preclude indemnity (and thus exonerate the stevedore) must at least prevent or handicap the stevedore in his ability to do a workmanlike job. *Mortensen* v. *A/S Glittre,* 348 F.2d 383 (1965); *Albanese* v. *N.V. Nederl.,* 392 F.2d 763 (1968). In the *Albanese* case

the Supreme Court rearticulated the proposition that whether the stevedore breached its warranty of workmanlike performance and whether the shipowner was precluded from recovering indemnity were issues that must be left to the jury's determination. *International Terminal Operating Co., Inc.*, v. *N.V. Nederl. Amerik. Stoomv. Maats.*, 393 U.S. 74, 89 S. Ct. 53.

The function of a reviewing Court then is solely to determine whether there is evidence to support the verdict.

There is ample testimony in this case reflecting conduct on the part of the shipowner sufficient to preclude recovery of indemnity from the stevedore. The Court's charge that the shipowner would be entitled to indemnity unless by some action or inaction it prevented, hindered or seriously handicapped I.T.O. in performing its workmanlike job or fulfilling its obligations was eminently correct. Although this Court has indicated that conduct on the part of the shipowner sufficient to preclude indemnity must hinder, prevent or handicap the stevedore in its ability to do a workmanlike job, this conduct, *which would of necessity constitute negligence on the part of the shipowner*, can be an act of omission or commission since it is elementary that negligence can consist of acts of omission as well as commission.

In *Waterman Steamship Corporation* v. *David*, 353 F.2d 660 (Fifth Cir. 1965), the Court in discussing what conduct on the part of a shipowner would be sufficient to preclude indemnity said (pp. 665 and 666):

> ". . . If a vessel's unseaworthiness prevents the stevedore's workmanlike performance, that is 'conduct' on the part of the shipowner 'sufficient to preclude recovery', and to excuse even a negligent breach by the stevedore."

* * * * *

> "Here the jury concluded that in spite of Atlantic's negligence, the defective roller beam assembly was the proximate cause of the accident and amounted to conduct on the part of the shipowner sufficient to preclude indemnification. We cannot say that the jury was confused or inconsistent or that the record fails to support the jury's finding."

Obviously, if a vessel's unseaworthiness which prevents a workmanlike performance by the stevedore is conduct on the part of the shipowner sufficient to preclude indemnity, *negligence on the part of the shipowner would certainly constitute conduct sufficient to preclude indemnity,* if a jury so found. In the case at bar the conduct on the part of the shipowner in seeking to have an *excessive* quantity of pipe loaded into an *insufficient* number of pipe beds has been found by the jury to be conduct which hindered or prevented the stevedore from doing a workmanlike job.

Further, there was proof, obviously believed by the jury, of the (a) failure of the shipowner to inspect the pipe bed, (b) failure of the shipowner to properly supervise the operation of loading pipes into the pipe bed, and (c) the requirement to load too much pipe into the pipe bed in order to comply with the cargo plan.

In *Humble Oil and Refining Company* v. *Philadelphia Ship Maintenance Co.*, 444 F.2d 727 (Third Cir. 1971), the Court in reviewing the cases dealing with indemnity came to the conclusion that the test for indemnity would be better articulated in terms of shifting the risk of loss rather than setting up standards of conduct. Once a condition of unseaworthiness was established in a direct action against the shipowner the burden fell on the shipowner to demonstrate that a condition of unseaworthiness was caused or activated by the stevedore and that such conduct by the

stevedore constituted a breach of his implied warranty of workmanlike service. In dealing specifically with the question of conduct on the part of the shipowner, sufficient to preclude indemnity, the Court said (p. 732):

> ". . . The burden then shifts to the stevedore to demonstrate that some action *or inaction* by the shipowner calls the *Weyerhaeuser* corollary into play, thus precluding any *Ryan* right of indemnity." (Emphasis added)
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> "*Whether the shipowner has created conditions which so impede the stevedore's performance that his breach may be excused is a weighing process,* Waterman Steamship Corp. v. David, *supra, peculiarly within the province of the factfinder.* Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, 369 U.S. 355, 82 S. Ct. 780, 7 L.Ed. 2d 792 (1962)." (Emphasis added)

Certainly, a direction by the shipowner to the stevedore to load more pipes into the pipe bed than it would hold would actively hinder the stevedore in the performance of his work and prevent it from doing a workmanlike job. Having controlled the operation and actually having created the condition by reason of its faulty instruction, why should not the shipowner be precluded on equitable principles from recovering indemnity.

Significantly, in this case, as the Trial Judge pointed out in his decision denying the defendant's post-trial motion, the first exhibit requested by the jury was the ship's cargo plan. The request in this case for the ship's cargo plan indicated that the jury from the outset was thinking in terms of the amount of cargo to be loaded, the number of pipe beds into which a pipe cargo was to be loaded and the responsibility therefor. Manifestly, the jury found that the

defendant shipowner was negligent in failing to order enough pipe beds, in attempting to load too much pipe into the pipe beds which it had ordered, and in negligently supervising the loading operation so as to prevent the pipe beds, which it had ordered, from being overloaded.

This conduct on the part of the shipowner not only constituted negligence but constituted conduct on its part which handicapped the stevedore in the performance of its work and precluded the shipowner from recovering indemnity.

The jury's verdict was and is amply supported by the evidence.

CONCLUSION

The Court's charge on all features of this case was eminently correct. The jury's findings are amply supported by the evidence and under the authorities which are set forth *supra* the judgment dismissing the third-party complaint of the shipowner against I.T.O. should be affirmed to which ends this brief is

Respectfully submitted,

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